LAW AND FACT.

THE practising lawyer who takes up Professor Thayer's book on Evidence[1] with the hope of finding it an index to the latest case law will be disappointed. The practical treatise is yet to come. But every earnest student is under a deep obligation to the author for the pains he has taken to "throw light on the beginnings and true character of our rules of evidence." It is clear that if the common law is ever to be fully systematized, the work must be done by specialists who, like Professor Thayer, are willing to devote years to the development of single topics. It long ago became impossible for any one lawyer to occupy the entire field of the common law, and even the judges who cross that field from one end to the other in the performance of their daily duties show signs of fatigue.

The author has handled roughly some of our cherished traditions and has set us all a-thinking. One tradition I am inclined to stand by, in spite of what is said to the contrary, namely, that the construction of a written instrument is a question of law and not a question of fact. The author's view is sufficiently indicated in this paragraph.

"It is not uncommon to call the interpretation and construction of writings 'a pure question of law.' That it is a question for the judge there is no doubt. But when we consider to what an extent the process of interpretation is that of ascertaining the intention of the writer — his expressed intention — irrespective of any rules of law whatever, and when we come to undertake the details of such an inquiry, it is obvious that most of this matter is not referable to law but to fact." (page 203.)

This conclusion may be right if the author's definition of law is right as we find it on an earlier page. "What then do we mean by law? We mean at all events a rule or standard which it is the duty of a judicial tribunal to apply and enforce." (page 192.)

It appears then that the construction of a written instrument may or may not be a question of law according as there is or is not

[1] A Preliminary Treatise on evidence at the Common Law. By James Bradley Thayer, LL.D. Boston: Little, Brown & Co., 1898.

a rule or standard already declared for the guidance of the courts in its construction.

For example, when the first court decided that "heirs at law" in a gift of personalty did not mean heirs at law at all, but something very different, that was a question of fact. When the second court decided the same point, that was a question of law because a rule had been established. When the third court decided that heirs at law in a gift of realty and personalty meant heirs at law, that was a mixed question of law and fact, because, although there was a rule of law, the court held that the rule was not applicable to that case.

I respectfully submit that the learned author's definition of law is inadequate, and that law, or what in our language passes for law, comprises every judicial decision which is so made and recorded as to become a precedent for future cases, whether the judge who made the decision had a rule for his guidance or not.

It is astonishing with what tenacity we cling to the notion that the administration of justice presupposes the existence of a body of law imposed upon the judges by some external force. We shake off the notion that law is the mandate of the sovereign only to substitute the mandate of society or the "social standard of justice" or some other unseen power. The idea that a body of picked men can administer justice and serve the ends of peace and security for which courts are established without being told what to do by some outsider cannot get a lodgment because our brains are preoccupied by "law," and yet we see the workings of our courts of justice every day and our judges seem to be free agents except as they respect the decisions of other judges who have preceded them; and we feel just as secure under this system as if we were living under a code of forty volumes. If we feel reasonably certain that cases are going to be decided in the future as they have been in the past, what more do we need in the way of law?

Take a simple illustration. A man has two sons. The elder robs an apple-orchard. The father takes him in the act and applies the switch. The younger brother watches the operation. The father has never commanded his sons not to rob apple-orchards but the younger boy knows by long experience that the administration of parental justice is uniform. For the purpose of promoting good order in that family, that single case has all the effect of a positive command. If the father chooses to say as he wields the switch, "I am doing this because I do not approve of stealing," that

reason may indicate a little more clearly to the younger son just what path he must avoid in order to avoid the switch, but the connection between the act and the switch may be so obvious as to render explanations unnecessary.

Is it hard to conceive of a silent man at the head of a family meting out punishments and rewards in his court of justice so impartially and so judicially that his boys will be as well behaved and will know as well what they ought to do and what they ought not to do as if they were governed by a code of laws?

When Bentham wrote of "Sham Law," and "Spurious Law," and "Judge-made Law" and "Ex Post Facto Law" the bar was set against him partly because his manner was not conciliatory, but mainly, I fancy, because of a confusion in the use of terms. His statement that "in the domain of common law everything is fiction except the power exercised by the judge"[1] seems extravagant, but so far as it asserts that what we call the common law springs from the power of the judge to decide the case before him, it can hardly be questioned.

The sole power of the judge is to decide the case before him. But in deciding that case he has a right to respect the decisions of his predecessors, and that right becomes a binding obligation upon him when he sees that respect for precedents is all that separates order from chaos in the administration of justice.

Now when you have, first, a judgment, and secondly, respect for that judgment as a precedent, you have a first-rate substitute for law, and you secure in the course of time a much greater certainty in the administration of justice than you could get without precedents under the most voluminous code that was ever written.

How the lawyers and judges came to put the cart before the horse by assuming that law preceded judgment is a question for the black-letter men. It may be as Bentham intimates, that the judges adopted this device in order to lend a fictitious authority to their judgments. We can well imagine that it was easier for a judge to dispose of a disappointed suitor by saying: "Thus saith the Law," than by saying: "I have decided against you because that is my opinion of the merits of your case." It seems more probable, however, that "law" came to be used in a double sense because, as Bentham points out, "the individual decree has the effect of law, of a real law, issued by the legislator acknowledging

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[1] Works of Bentham, iii, 223.

himself such and acknowledged as such." It is quite natural that two things which produce the same effect should be called by the same name, and it is only when we are looking at the cause instead of the effect that this poverty of language gets us into trouble. That it does get us into trouble at times there can be no doubt. For example, in assuming that it is the duty of the judge simply to declare and apply the law we are compelled to look for the outside source of supply. We go back as far as we can, and failing to find it, assume with Blackstone that it is prehistoric, and that all traces of it have been effaced except as they have been preserved in the records of the courts. And yet we know all the while that nine-tenths of our law has arisen within the last two hundred years, and that if we were to search the Year Books for an answer to the questions of law which our clients put to us, we should get no help whatever. The assumption too that the courts have any special mission to "declare the law" is contradicted in every volume of our reports. The courts are constantly enlarging, cutting down or denying altogether rules which have been stated in the earlier cases, and they do it with entire freedom.

Thus Gray, C. J., disposes of such rules by saying that they are "suggestions" made "by way of argument only and not of adjudication."[1]

Again we hear one judge referring to the decision of another as an act of legislation, but where shall we find a judge willing to admit that he himself is legislating?

The fact is that in the sense in which any judge legislates every judge legislates, and he is compelled to legislate because he is bound to decide the case before him and so to establish a new precedent. Markby (Elements of Law, s. 26) calls attention to the provision of the French Code, which makes it penal offence for a judge to refuse to give a decision upon the ground of the silence or the insufficiency of the law. Without this statutory compulsion has any one ever heard of a common law judge who refused to render judgment, because there was no law applicable to the case? So long as the practice of reporting cases and using them as precedents continues, judicial legislation is not a usurpation of power. It is inherent in the strict performance of judicial duty.

We speak of the principles of equity as things which the early Lord Chancellors were accustomed to manufacture out of hand,

[1] Hall *v.* Bliss, 118 Mass. 560.

but we say that now this creative power is gone and that the principles of equity are as fixed and rigid as the principles of law.

It is the old case of the growing tree. You may stand and watch that tree for an hour and see no sign of growth, and yet you know that the tree is a good deal bigger than it was ten years ago and that the same vital force which drew that tree from the soil is now extending its branches. The apple-tree cannot grow back again into the ground and start as a pear-tree in some other part of the orchard. The growth of next year will be determined partly by the environment of soil and atmosphere and mainly by the condition of the present tree to which that growth must be added. The legislative gardener may potter about that tree and prune and graft. But as long as the tree lives it must grow.

But it was not necessary for us to wait for Sir Henry Maine[1] to tell us that judgment preceded law in primitive societies to learn that this is the true order of succession in our common law, for the reports show us precisely how our law is made.

Take a single illustration. In 1721 Reason and Trantor were put on trial for the murder of Lutterell. The prosecuting attorney called a clergyman who testified that Lutterell on his death-bed declared that as he was a dying man the defendants barbarously murdered him. A majority of the judges held that this evidence was admissible. The court gave no reasons, stated no rule, cited no precedents, but simply admitted the evidence. They were bound either to admit the evidence or to exclude it, and whether they ruled it out or in, they made a new precedent.[2]

Notice that in this case it appeared that Lutterell knew that he was dying. The court did not say that this circumstance was material and it was open to any future court to hold that it was material or immaterial. In 1789 that circumstance was held to be material in a case which called for a decision upon that precise point.[3]

Note also that the first case was the trial of men for the murder of the declarant. It was open to any future court to hold that this also was an immaterial circumstance, and to admit a dying declaration in civil cases, as coming within the "principle" of Rex *v.* Reason. But the later courts in fact held that this cir-

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[1] Maine, Ancient Law, page 3.

[2] Rex *v.* Reason and Trantor, 1 Strange, 498; Thayer's Cases, 348.

[3] Woodcock's Case, Leach, 500; Thayer's Cases, 354.

cumstance was material and so the rule as to dying declarations has come in the course of one hundred and fifty years to be formulated and defined, not because the courts have usurped legislative functions, but because each court has been compelled to answer yes or no to every question of evidence which has been properly presented, just as it must give judgment for the plaintiff or for the defendant in every case within its jurisdiction.

Why is it not as correct to say that the law of dying declarations has been made by the courts, as to say that a statute is made by the legislature? When James C. Carter,[1] discarding all other definitions, declares that law consists of "rules springing from the social standard of justice," what does he mean except that the judge like the legislator is a product of the soil? The legislator of to-day does not make such laws as were made two hundred years ago, because the state of society to which he belongs is different. But when we speak as lawyers and not as historians or philosophers, we say that the statute is made by the legislator and not that it is determined by the social standards of the time. The reason why we are so reluctant to say that our common law is made by the judge, is because of that old trouble with the word "law." We forget that since a judgment when used as a precedent "has the effect of a real law" to say that a judge makes the law is simply to say that he renders a judgment which becomes a precedent.

If then our law springs from our decided cases and from the use of cases as precedents, I know of no practical test of law as distinguished from fact except that it is that part of the case which the judge chooses to decide and to decide in such a way that his decision may be used as a precedent for future cases. In order that a case may be available as a precedent, it is necessary that not only the conclusion but the premises from which the conclusion is drawn shall be recorded. Any number of records showing simply that judgment was entered for the plaintiff or for the defendant would be of no value as precedents; and in precisely that way the verdict of the jury is always rendered. The jury may state their conclusions in detail as in a special verdict or may find generally for the plaintiff or for the defendant; but the premises upon which their conclusion is based are never stated, and so careful are we that the verdict of the jury shall not be used as a

[1] Address before the American Bar Association, August 21, 1890.

precedent, that when two successive juries sit in the same case pains is taken to prevent the second jury from learning the verdict of the first. Now it is entirely conceivable that in a rude state of society the jury might be left to settle the entire controversy between plaintiff and defendant, that the judge should exercise merely the function of a sheriff to preserve order in the court room. As a matter of fact, the judges have always insisted on taking a hand in the decision of the case.

Professor Thayer refers to the various devices by which judges have undertaken to decide questions which might otherwise have been left to the jury, for example, special verdicts, demurrers, new trials. By these means he asserts that the judges have been forever advancing upon the "theoretical province of the jury." After his patient examination of the history of jury trial he certainly has a right to speak with authority upon the question, what the theoretical province of the jury really is. But in referring to the various processes by which questions have been turned over to the court which might have been left to the jury, he has described the whole process of law making. For it is very certain that if everything had been left to the jury there would have been no law.

I respectfully dissent, then, from Professor Thayer's statement that "to be told that law is for the court and fact is for the jury enlightens us not at all as to the discrimination between law and fact." (b. 183.) That part of the case which is left to the jury is fact, as it seems to me because it is left to the jury; and that part which is decided by the judge is law because he chooses to decide it and to decide it in such a way that it shall be used as a precedent for future cases.

A jury for example decides that a man is negligent because he got off the train while it was in motion. A judge reaches the same conclusion from the same premises. Why is the conclusion in the one case fact and in the other case law? The jury and the judge are alike rational beings and have reached the same conclusion by the exercise of their reasoning faculties. What then is the distinction? I know of none except that the conclusion of the judge goes upon the record and every succeeding judge is bound to accept his conclusion as correct, while the second jury is not bound to accept the conclusion of the first jury and is not even permitted to know what that conclusion was. It may reach the same conclusion by accident, but not by precedent.

Undoubtedly judges decide many questions of fact. Not all

of their decisions become precedents. In many departments of their work they prefer "discretion" to precedent. Judge Wells refers to the question of the competency of an expert as a question "mainly of fact," [1] meaning that within the limits of the discretion which is given to the judge, he is bound by no precedent and his decision makes no precedent for any future judge. Lord Esher says that an equity judge does not bind "his successors in the decision of questions of fact; it is decisions upon questions of law which are binding." [2] He suggests no test, however, for distinguishing law from fact, unless it be that in the one case the decision is and in the other case it is not binding.

No better proof of the saving grace of precedent can be found than in the vagaries of judicial discretion. Sentences for crime, within the limits of the statute, have always been left to the discretion of the judge and the inequality of sentences depending upon the mood of the particular judge has become so flagrant that the tendency of recent legislation is to take away this discretion and intrust it to the prison authorities. Those who have had occasion to observe the sentences imposed by our inferior courts for small offences will see the force of the opening sentence of a recent act: "When a convict is sentenced to the State Farm the court or trial justice imposing the sentence shall not fix or limit the duration thereof." [3] *Jabez Fox.*

[1] Commonwealth *v.* Williams, 105 Mass. 62, 68.

[2] In re Norman, L. R 16 Q. B. D. 673, 675.

[3] St. 1898, c. 443.